No. 14540

United States Court of Appeals

For the Ninth Circuit

BOEING AIRPLANE COMPANY, a corporation,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

BRIEF OF BOEING AIRPLANE COMPANY IN ANSWER TO BRIEF OF AMICUS CURIAE REPRESENTING SPEEA

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BRIEF OF BOEING AIRPLANE COMPANY IN ANSWER TO BRIEF OF AMICUS CURIAE REPRESENTING SPEEA

The brief of the Union, by its counsel as amicus curiae, was served on counsel for the Company May 13, 1955. Consent to the filing of such brief was stipulated by the Company and the Board.

The principal effort of the Union brief seems to be in the direction of characterizing the issue before the Court as one of fact rather than one of law, and then urging affirmance of the Board majority decision on the stated ground that decisions of the Board on issues of fact should be left undisturbed.

This position expressed in the Union brief runs counter to statements both by the Trial Examiner (R. 27) and by the majority of the Board (R. 131) that the facts of the case are substantially undisputed. Also, the major "factual" argument to which five pages of the Union brief are devoted (relating to the so-called "Gentlemen's Agreement") is predicated on stated "facts"

that are unsupported by and inconsistent with findings of the Board majority, such majority having stated that matters relating to the "Gentlemen's Agreement" were not regarded as material to its decision. For further discussion of the subject, see pages 6 to 10 of the Company's reply brief.

The Union brief discounts or refrains from mentioning the following findings of the Trial Examiner that have *not* been disturbed by the Board majority:

1. Finding that if the MAC had been successful, the damage to Boeing would have amounted to millions of dollars (R. 98).

2. Finding that there is no indication in the Record that the implementation of the AIA resolution by the Association's membership really "froze" engineers in their jobs (R. 91-2).

3. Finding that the character of the MAC as a counter measure to the Gentlemen's Agreement does not endow the MAC with privilege or justification (R. 93-4).

4. Finding that the contended effect of the AIA resolution would probably exist even in the absence of such resolution (R. 92).

5. Finding that the Union anticipated that the MAC would accelerate Respondent's rate of engineer turnover due to the short supply of engineers, and that such development was to be used as a bargaining lever in the negotiations (R. 97).

6. Finding that there can be no doubt of the possibility that employee attrition as a result of the MAC might have reached such proportions as substantially to affect the Company's operations (R. 100).

7. Finding that the probable harmful results of the MAC would have persisted far beyond those properly to be anticipated from a strike of reasonable duration (R. 97).

8. Finding that the MAC, if successful, could have contributed substantially to significant impairment of the Company's ability to operate, which could have lasted for a notably lengthy period of time (R. 97).

9. Finding that there was serious reason to doubt the merit of the particular benefit to themselves intended by the Union membership (R. 98).

10. Finding that there was serious reason to doubt whether the impasse in the negotiations could be said to "justify" the MAC as a device to stimulate renewed negotiations (R. 98-99).

11. Finding that the Company was justified in fearing that the successful completion of the MAC could have forced the Company to shut down several of its current projects; finding that its contracts with the Air Force might have been cancelled as a result, with immensely significant financial repercussions; and finding that the replacement of any experienced engineer who resigned, in the light of the current engineer shortage, would have taken as much as several years (R. 98).

The error in the conclusions reached by the Board majority is essentially one of misinterpreting the true intent of the statute and misapplying the statute to a Record that is substantially undisputed.

* * * *

The remainder of the Union brief for the most part

reiterates arguments that have been advanced by the Board and previously treated in the Company's briefs. Inaccuracies and inconsistencies thought to merit particular further mention are as follows:

* * * *

Page 2 of Union brief:

> "SPEEA did not take any steps to induce Boeing employees to leave their employment * * *"

Compare this statement with the fact that 2,800 letters were sent out to employers all over the country, with the elaborate preparations for the MAC that were completed, and with the extensive publicity that the Union gave to the MAC over a period of many months in which the MAC was characterized as a "punitive action to reduce the Engineering services available to Boeing" (R. 33, 478) and "to encourage engineers to seek more suitable employment elsewhere" (R. 368). The Trial Examiner found that the Union expected and intended such results (R. 97).

* * * *

Page 8 of Union brief:

> *"'* * * the MAC was conceived as a device reasonably calculated to assist the Union* * * *'"

The fact that a concerted activity is calculated to assist a union does not thereby make it protected. It cannot be argued that the sitdown strike in the *Fansteel* (*N.L.R.B. v. Fansteel Metallurgical Corp.,* 306 U.S. 240, 59 S.Ct. 490, 83 L.Ed. 627 (1939)) case was not calculated to assist the union there involved.

* * * *

Page 11 of Union brief:

> "'There was here in essence only a conditional threat that some of the Respondent's employees

> would resign if the Respondent did not meet the Union's stated bargaining demands, conduct which the Board, with Court approval, has held to be protected concerted activity."

This quote from the majority Board opinion represents an attempt to draw a parallel between the instant case, and *Southern Pine Electric Cooperative,* 104 NLRB 834, 32 LRRM 1156 (1953) and *N.L.R.B. v. Martin* (*Nemec Combustion Engineers*), 207 F.2d 655, 33 LRRM 2046 (CA-9 1953) enf'g 100 NLRB 1118, 30 LRRM 1394 (1952), which parallel is not possible for the following reasons:

(a) In the instant case the program identified as the MAC had been built up by the Union over a period in excess of a year. The parties, unlike those in the *Southern Pine* and *Nemec cases* had bargained over a period of months, had reached an impasse and the final Company offer had been flatly rejected. At this point there hardly could have been a "conditional threat" to abandon employment if the Union demands were not met. The Union was well past the "threat" stage when it made the final arrangements for the MAC and sent out letters to 2,800 firms. cf. *Crescent Wharf & Warehouse Co.,* 104 NLRB 860, 32 LRRM 1157 (1953).

(b) The *Southern Pine* and *Nemec* cases both involve situations where employees threatened to quit if their demands were not met. They were not inducing or encouraging or facilitating *other* employees to terminate permanently. They were not, as Pearson was, organizing and leading a campaign to encourage and promote the terminations of *others* and the hiring of the latter by the Company's competitors.

(c) A close scrutiny of the facts in both the *Southern Pine* and *Nemec* cases shows that actually something in the nature of a strike was threatened rather than abandonment of employment.

(d) No employee, either in *Southern Pine* or *Nemec,* made any such unequivocal statement as "This is to advise you that SPEEA has started *and will complete* a Manpower Availability Conference" (R. 493) (emphasis added). It is to be noted in this respect that the SPEEA letter advising Boeing of the activation of the MAC contained no "conditional threat" of any kind and was completely silent on the matter of Boeing wages or the Union's demands in regard thereto.

(e) Damage to the employer was not an important or primary objective in either the *Southern Pine* or *Nemec* case. In neither case did the employees have in mind any punitive action to discourage new hires from coming to the employer, as here (R. 32-3, 477-8).

(f) In the *Southern Pine* and *Nemec* cases *no union or certified collective bargaining agent was involved.* In 1947 the Taft-Hartley Act amended the Wagner Act to impose reciprocal duties upon employers and collective bargaining agents alike, to bargain in good faith in accordance with the standards of bargaining required by the act. Section 8(a)(5) specifies such obligation on the part of the employer and Section 8(b)(3) imposes the identical obligation on the exclusive representative of the employees in an appropriate unit under Section 9(a) of the Act. SPEEA was such an agent. The Union brief repeatedly asserts that the MAC was an activity of SPEEA and it emphasizes and directs particular

attention to the findings of the Trial Examiner that the MAC was conceived as a device to strengthen the position of the Union in the negotiations then current (Union brief, page 8). The MAC is asserted by the Union to have been an integral part of its bargaining technique. The complaint alleges in paragraph IX thereof (R. 11) that the MAC was "undertaken to break the bargaining impasse then in existence."

It is obvious that a course of conduct cannot at once constitute both a protected activity under Section 7 and also a refusal to bargain under Section 8(b) (3). The latter section imposed no duty or standards of bargaining upon the individuals involved in the *Southern Pine* and *Nemec* cases. However, as pointed out at pages 40 to 44 of the Company opening brief, SPEEA *because it was the certified bargaining agent* was subject to Section 8(b)(3) and its course of conduct in connection with the MAC, of which Pearson's activities were a part, clearly amounted to a failure to meet the standard of bargaining required by that section and Section 8(d). The Trial Examiner declined to pass on this point because it was one of first impression (R. 76) and the Board majority makes no mention of it.

* * * *

Pages 11-12 of Union brief:

> "* * * the negotiations turned largely on the determination of what the available rates from other firms might be. * * * Determining what in actual fact were the terms available elsewhere, through a market mechanics such as the MAC, became a matter of primary concern to SPEEA."

It is unbelievable that the representatives of 2,800

firms would be summoned to Seattle for the purpose of clearing up this matter, assuming, for the moment that SPEEA lacked such knowledge.

* * * *

Page 12 of Union brief:

> "As American citizens [the employees have the right to leave Boeing]."

The right is unchallenged and its jeopardy or protection is in no way involved in the case.

* * * *

Page 12 of Union brief:

> "Petitioner greatly exaggerates the effect of the MAC if successful, basing its argument upon speculative testimony of a Boeing witness given in response to a hypothetical question unsupported by fact"

The ultimate, drastic and extended damage to Boeing in the event of a substantial exodus of its engineers as the result of the MAC is so obvious as to hardly require proof. Logan's testimony, attacked in the Union's brief, is patently conservative. The Trial Examiner, who observed the witness testify, accorded the testimony complete credence (R. 98). The majority Board opinion in no way disturbed such finding on the part of the Trial Examiner. Compare the Union's argument, earlier in its brief, as to the weight to be accorded the findings below. The Record is undisputed that a successful MAC would result in material damage to Boeing (R. 420), as shown by the findings heretofore mentioned of the Trial Examiner.

* * * *

Page 12 of Union brief:

> "*The question asked* [Logan, relating to 500 engineers leaving the employ of Boeing] *presupposes facts contrary to the record.*"

The letter sent by the Union to the 2,800 firms states in part "Over 500 engineers, scientists and industrial mathematicians are pledged to attend the Conference" (R. 487). The number mentioned in the question was conservative and had ample basis in the Record. The only limitation placed upon participation in the MAC was that it was to be confined to SPEEA members (R. 37), numbering some 2,100 (R. 35).

* * * *

Page 13 of Union brief:

> "[The number of engineers that left] of course would be under the control of Boeing by seeing to it that its terms of employment were competitive."

The Record contains nothing that would indicate that Boeing was not competitive with others on matters of wages, hours and working conditions and, in fact, clearly indicates a determination on the part of Boeing to remain competitive (R. 429-33). It is a fallacious argument to say that under such circumstances an employer can "control" the damage by increasing wages. Such an argument could be advanced in support of substantially all damaging and unprotected concerted activities, including those situations involving damage resulting from sabotage, sitdown strikes, wildcat strikes, etc.

* * * *

Page 13 of Union brief:

> "The MAC was intended as an expedient less drastic than a strike * * *"

True, from the viewpoint of those promoting the

MAC—they could remain on the payroll until such time as they accepted other employment, thereby suffering no wage loss. Boeing, on the other hand, as the Trial Examiner put it, would probably have suffered damages "far beyond those properly to be anticipated from a strike of reasonable duration" (R. 97). The majority of the Board did not disturb this finding.

* * * *

Page 14 of Union brief:

> "In letters to SPEEA * * * no argument was made that the potential damage to Boeing would outrun a strike; * * *.
>
> "Petitioner's argument in its briefs comes now as afterthought having no basis either in the findings or in any substantial evidence."

The Company's letter written immediately after Pearson's discharge, to which the Trial Txaminer refers (R. 51) clearly mentions the very damaging nature of the MAC program, and the Union warned the Company of the potential damage of the MAC program as early as the fall of 1952, several months prior to Pearson's discharge (R. 419-20).

* * * *

Page 14 of Union brief:

> "Problems Posed for SPEEA by the 'Gentlemen's Agreement,' * * * Afford Independent Justification for SPEEA's Holding the MAC"

As shown above, such contention is directly contrary to the finding of the Trial Examiner (R. 91-4) which in this respect was not disturbed by the Board. The majority opinion is not based on any such contended "justification."

* * * *

Page 15 of Union brief:

> "The Board in a footnote stated that the question whether the MAC in fact restricted employment opportunities is immaterial * * *. We agree, but suggest that the extent to which necessity was presented affords additional, independent, justification for the MAC."

The term "MAC" is believed to have been inadvertently used instead of "Gentlemen's Agreement" in the foregoing statement. If this belief is correct, and the Union agrees that the effect of the Gentlemen's Agreement upon employment is immaterial, it is not clear, even from the Union's standpoint, as to how such "Agreement" can be at the same time regarded as immaterial and urged as a "justification" for the MAC.

* * * *

Page 16 of Union brief:

> "Illustrative letters are in evidence wherein members of the Aircraft Industries Association had refused consideration of employment applications made by SPEEA members * * *."

These letters do no more than follow the usual policy of most employers, particularly those employing professional men. See the remarks of the Trial Examiner in which he recognizes that such policy would probably exist in the absence of a "Gentlemen's Agreement" (R. 91-2). Moreover, as pointed out in the Company reply brief (pages 7-8), the Boeing practice was shown to vary from that of other AIA companies and in no way inhibited *Boeing* employees insofar as contacts with other employers were concerned.

* * * *

Page 16 of Union brief:

> "The 'Gentlemen's Agreement' of the Aircraft Industries Association went so far as to violate the anti-trust laws"

The pertinency of this unfounded observation is not apparent.

* * * *

Page 20 of Union brief:

> "Senator Taft * * * himself recognized that a Union might perform the functions of an employment agency. * * *
>
> " 'If in a few rare instances the *employer* wants to use the Union as an employment agency, he may do so * * *'." (emphasis added)

Senator Taft was not talking about a device designed to expedite and encourage employees to *leave* an employer, to take employment with others, some of whom are competitors.

* * * *

Page 20 of Union brief:

> "The Board and the courts have taken for granted the legality of the Union's operating a hiring hall or employment agency"

See the Company reply brief, page 12, and the remarks of the Trial Examiner (R. 88-9), relating to the attempted hiring hall analogy.

* * * *

Page 21 of Union brief:

> "This very circumstance [Boeing being the only aircraft manufacturer in the Pacific Northwest] renders it necessary for SPEEA to establish and maintain contacts with other aircraft manufacturers * * *. Without such a mechanics as a MAC,

SPEEA members would be Boeing captives, left to accept such terms as the Company wished."

* * * *

The Record clearly supports the contrary conclusion. See also Company reply brief, page 4.

* * * *

Page 21 of Union brief:

"Here [in *Metal Mouldings Corporation,* 39 NLRB 107 (1942)] an employee was * * * properly discharged * * *. Wholly lacking was the element of concerted activity authorized or sponsored by a labor union * * *."

Authorization of an activity by a union does not render it "protected." Also it is to be noted that the reference to this case in the Company opening brief is to the decision of the Court of Appeals (CA-6). The reference to the case in the Union brief (39 NLRB 107) is to the Board decision which the Court of Appeals reviewed and refused to enforce. The Board had held that the discharge involved in the case was because of the individual's participation in protected, *concerted,* anion activities. The Court held that the discharge was properly for cause because of the part played by the individual in inducing other employees to leave and go to another employer. We are unable to find in such Board decision the statement attributed to the Board that appears at the top of page 22 of the Union brief. See also Company reply brief, page 13.

* * * *

Page 22 of Union brief:

" * * * both the Trial Examiner and the Board made explicit findings on this point [the contention that SPEEA was taking steps to induce em-

> ployees to leave Boeing] rejecting Petitioner's contention (R. 44, 75, 137),"

The Record references afford no support for this statement. On the contrary, the uncontroverted evidence in the Record shows that the MAC was devised as a means "to *encourage* engineers to seek more suitable employment elsewhere" (R. 368) (emphasis added).

* * * *

We confess difficulty in following the "constitutional" argument appearing in the Union brief, pages 22-25. Apparently it is urged that the terms "disloyal," "unlawful," "improper," "indefensible" and "illegal" must be discarded in testing the protected or unprotected nature of a concerted activity. Otherwise the Board will be permitted to "legislate" in contravention of the Constitution. The brief does not define exactly where this argument leads but it would appear to indicate that the Board in determining whether an activity is protected must, according to the argument, adhere strictly to the literal application of the language of Section 7 to each case. As pointed out on page 21 of the Company opening brief, this would legitimatize all concerted activity including slowdowns, sitdown strikes, wildcat strikes, disloyalty, refusal to obey rules, etc. It would seem unnecessary to refer again to the numerous decisions that compel rejection of any such argument. The argument fails to consider the general purposes and objectives of the Act and ignores completely the right preserved in the Act to discharge for cause. If the language of the Act permits leeway on the part of the Board and the Courts, such as mentioned in the Union brief, the argument would seem to

involve necessarily the constitutionality of the Act itself, and the Supreme Court has long since put any such question to rest (*N.L.R.B. v. Jones & Laughlin Steel Corp.,* 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937)). On the contrary, it is urged on behalf of the Company that the language of the Act when read in its entirety permits no such leeway and clearly precludes the Board from reaching any such unfounded decision as is indicated in the majority opinion.

* * * *

The remainder of the Union brief urges certain distinctions and interpretations as to decisions cited and discussed in the briefs previously. We shall not reargue the purport of these decisions here other than to point out certain statements that are in error.

1. On page 26 of the Union brief in discussing the Supreme Court decision in the *Jefferson Standard* (*N.L.R.B. v. Local Union No.* 1229, *International Brotherhood of Electrical Workers* (*Jefferson Standard Broadcasting Co.*), 346 U.S. 464, 74 S.Ct. 172, 98 L.Ed. 195 (1953)) case it is stated that: "Here the union had been conducting a strike and peaceful picketing when several members embarked upon a frolic of their own, giving rise to the questions presented in the case:" No strike was involved, the employees remained on the payroll and they were not embarked upon "a frolic of their own" because their activity had the approval and sanction of the president and the executive committee of the union (see Board's decision in the case, 94 NLRB No. 227, 28 LRRM 1215 (1951)).

2. On page 27 it is said that the Supreme Court based its result in the *Jefferson Standard* case "on two

grounds: (a) that no activity of the union was presented, and (b) the activity of the individuals was deliberately disassociated from collective bargaining * * *." As mentioned above, the activity had the sanction of the union officials and it was closely associated with collective bargaining, the Supreme Court stating: "the main point of disagreement arose from the union's demand for the renewal of a provision that all discharges from employment be subject to arbitration * * * " etc. As in the case of the *Jefferson Standard* handbills, the letter sent out by SPEEA to 2,800 other firms contained no mention of any Boeing-SPEEA controversy.

3. On page 31 the Union brief disposes of the Supreme Court's decision in *International Union, et al. v. Wisconsin Employment Relations Board, et al.,* 336 U.S. 245, 69 S.Ct. 516, 93 L.Ed. 651 (1949), by stating that the decision deals only with a separate question of federal-state jurisdiction. On the contrary in that case the Supreme Court was required to pass squarely upon the question of whether the activities there involved were or were not protected by the federal law.

CONCLUSION

We urge with all possible emphasis that the vital and important principle involved in this case does not turn upon any issue of fact, as the Union urges, but involves instead an issue of law that derives from a factual situation regarded by the Board, the Trial Examiner and the employer as substantially undisputed. The resolution of such issue of law must properly be in the direction of dismissing the complaint for the numerous rea-

sons mentioned in the briefs filed on behalf of the Company and in the minority opinion.

Any other result would require a drastic departure from the primary objective of the Act: to stabilize and engender peaceful employer-union relationships.

Any other determination requiring an employer to refrain from in any way interfering with activities of the type here involved would lead to results that are plainly incongruous and unintended by Congress. It is inconceivable that Congress could have intended to require an employer in the circumstances of this case to remain powerless to terminate employees who are at the time developing and activating such a campaign as the MAC; or to combat or interrupt, impede or interfere in any way with such a campaign; or to replace such employees with applicants who may be willing to work for the employer on the basis of his current wage rates; or to do anything but wait and watch the damage to him develop and progress and then and only then —at a time determined and selected by his employees —do whatever he can to recover from the situation, if that is then possible.

Respectfully submitted,

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